DOCKET FILE COPY ORIGINAL

ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	MM Docket No. 91-58
	)	
Amendment of Section 73.202(b)	)	RM-7419
Table of Allotments	)	
FM Broadcast Stations	)	RM-7797
(Caldwell, Texas, et al)	)	RM-7798

To: The Commission

PETITION FOR RECONSIDERATION

Respectfully Submitted,

ROY E. HENDERSON

By: Robert J. Buenzle
His Attorney

Law Offices
Robert J. Buenzle
12110 Sunset Hills Road
Suite 450
Reston, Virginia 22090
(703) 715-3006

March 15, 2000

INDEX

Attachments:

A. Declaration of Fred W. Hannel July 9, 1996
Declaration of Fred W. Hannel July 8, 1997

B. Engineering Statement

C. Henderson Site Change Application filed February 24, 2000

SUMMARY

The FCC issued a Decision in this comparative rulemaking proceeding on July 22, 1998 denying the proposal of Roy E. Henderson to inter alia, upgrade his station KLTR(FM) in Caldwell, Texas, and adopting the proposal of Bryan Broadcasting License Subsidiary to upgrade its station KTSR(FM) in College Station, Texas. In so doing,the FCC failed to consider a pleading filed by Henderson demonstrating Bryan's substantial non-compliance with 73.315(a) of the Commission's rules. On appeal the FCC admitted its error and asked for remand of the case to consider the facts raised but not considered in the Henderson pleading which it indicated "may be of decisional significance" in deciding this case.

Subsequent to remand, Bryan filed several applications to change its site to improve its coverage and come into compliance with the rules. These applications were filed after a date set by the Commission to consider any such matter to be of "decisional significance". Nonetheless, in its new Decision released February 15, 2000, the Commission did recognize and consider such Bryan filings in reaching its new decision in Bryan's favor. In that Decision, the Commission also disputed recognition of the existing tower at Henderson's site and Henderson's reliance upon FAA approval of his new tower at that site.

In this Petition for Reconsideration, Henderson refers to prior evidence in the record of the case, not referenced in the Decision, establishing a reasonable basis to expect FAA approval of the site, along with a newly discovered fact of a new tower substantially taller than Henderson's, now approved by the FAA 6 miles South of Henderson's site. Henderson submits that based upon these facts, the Commission should reconsider and credit the FAA acceptability of Henderson's existing tower proposal. Henderson also notes here that on August 13, 1999, the Commission granted a request for a voluntary "instant downgrade" to an existing station in Victoria, Texas, which opened a new area for Henderson's antenna location in full compliance with all FCC rules including full compliance with 73.315(a). It is Henderson's understanding that this station effected its requested reduction in power on February 17, 2000, and that a license application for the reduced classification was filed shortly thereafter. On February 24, 2000, Henderson filed an application to move his site to his new fully compliant location. Based upon these facts, Henderson has requested the Commission to reconsider its Decision and to adopt Henderson's proposal.

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	MM Docket No. 91-58
	)	
Amendment of Section 73.202(b)	)	RM-7419
Table of Allotments	)	
FM Broadcast Stations	)	RM-7797
(Caldwell, Texas, et al)	)	RM-7798

To: The Commission

PETITION FOR RECONSIDERATION

On February 15, 2000, the Commission released a Memorandum Opinion and Order in this proceeding (__FCC Rcd__, FCC 00-50) which affirmed a prior Decision in this case (13 FCC Rcd 13772 (1998)) in favor of the proposal of Bryan Broadcasting License Subsidiary ("Bryan") to upgrade KTSR(FM) in College Station, Texas, and denying the mutually exclusive proposal of Roy E. Henderson to upgrade KLTR(FM), Caldwell, Texas. For the reasons set forth herein, Henderson herewith, pursuant to Section 1.429 of the Commission's rules, Petitions the Commission for Reconsideration of its Decision.

I. Background

On July 22, 1998, the Commission released a prior Memorandum Opinion and Order in this case (13 FCC Rcd 13772 (1998)) which adopted the Bryan proposal and denied the Henderson proposal. In that Decision, the Commission initially rejected Henderson's claim of substantial compliance with the coverage requirements of 73.315(a) based upon its determination that the existing tower

located on the same site as specified by Henderson was "only 59 meters in height" and therefore, with unassailable logic, further determined that Henderson's tower (approximately 150 meters tall) would never be approved by the FAA. The only problem with that analyses was that the "59 meter tower" was just another mistake by the Commission in this case, 1/ and in fact the real tower existing at that site was actually 152 meters tall and had been there since 1983. Having corrected its prior mistake as to the site availability, it now compounded its previous error by relying upon the "59 meter tower".

Having thus claimed that Henderson could not rely upon his proposal since the FAA would never approve Henderson's tower being constructed by one only 59 meters tall, the Commission nonetheless, continued its analyses in paragraph 12, indicating that even if the 96% coverage claimed by Henderson were credited and even recognizing the superior coverage of area and population that would be achieved by the Henderson proposal, the Commission would be

> ...reluctant in this comparative rulemaking proceeding involving competing upgrade proposals to prefer an upgrade proposal [Henderson's] failing to provide the requisite 70 dbu signal to 100% of its community of license, as Section 73.315(a) requires. We recognize that where all else is the same, there would appear to be a preference for [Henderson's] proposed upgrade at Caldwell because it would serve an additional 48,755

1/ In its original Decision in this case in July of 1995, the Commission ignored a declaration by the site owner providing the tower site to Henderson and instead asserted the totally false position that the site was really owned by Bryan's tower consultant who would not let Henderson use it, that being a major ground for denial of Henderson in that Decision.

> persons while the upgrade at College Station will provide service to an additional 22, 908 persons. All else is not the the same however, for the [Bryan] College Station upgrade proposal fully satisfies Section 73.315(a) while Henderson's Caldwell proposal does not.(emphasis supplied)

Recognizing that a 96% coverage as proposed by Henderson would normally be considered de minimis, the Commission went on to say that:

> Even if we were to characterize the shortfall in [Henderson's] principal city coverage to be de minimis, we do not believe that waiver in this situation would be appropriate because it would prejudice a competing proposal [Bryan] in full compliance with Section 73.315(a) of the Rules. (Emphasis supplied)

Having said thus, the Commission went on to again indicate its reliance upon its nonexistent and totally wrong "59 meter tower" as indicating that the FAA would not likely approve Henderson's 150 meter tower thereby further weakening consideration of Henderson's proposal.

There were a number of other errors and mistakes in the Commission's original Decision that were raised in an appeal of that Decision filed by Henderson with the U.S. Court of Appeals for the District of Columbia Circuit on August 14, 1998 (Case No. 1372 and 1385), but for purposes of the instant Petition we just note those two. The points being that first, the existing tower referred to by Henderson has been in place, licensed by the FAA and the FCC as a matter of record since 1983 and it is 152 meters high, not 57 meters high; and second, that the basic premise of the Decision, inescapable from the Commission's own words was its error in thinking that Bryan was proposing total compliance with

the coverage requirements of 73.315(a) when in fact, that was not the case at all. To make it worse, Henderson had disclosed the fact that that was not the case (that Bryan proposed serving only 91% of its community) in a pleading filed with the Commission on September 29, 1997 directed specifically to that point. In its July, 1998, Decision, the Commission totally ignored that pleading as well as two others filed subsequent to it (one by Bryan and one by Henderson) and the facts disclosed therein went directly to the basis of the FCC Decision, so much so that on March 4, 1999, Commission Counsel asked the Court to remand the case back to the Commission so that the Commission could consider the important points raised in that pleading, so important that they were not characterized as "harmless error" but considered to be of potential "decisional significance". As characterized by the Commission to the Court:

> Inasmuch as the Commission's decision in this case was based largely on the perception that Bryan Broadcasting's proposal would be in full compliance with Section 73.315(a) of the Commission's rules, while Henderson's proposal would fall short of full compliance, the information contained in Henderson's Second Supplement may be of decisional significance.

The remand was granted by the Court on that basis and on those representations, but the Commission's most recent Decision is not only contrary to what it said there, it hardly touched upon the effect of Bryan's noncompliance that had been ignored in the original Decision and the very stated reason for the remand, focusing instead on a totally new analyses of Henderson's case (which had not changed since the prior Decision) rather than Bryan's whose new facts had been the very basis for the remand.

In response to the Court's remand, the Commission on April 9, 1999, issued a "Request for Supplemental Comments in Response to Court Remand", setting dates of April 29 and May 14 for Comments and Reply Comments respectively and then, at paragraph 4, including the following specific caveat:

> In the interest of administrative finality, no information submitted by a party concerning its proposal following the comment period will be deemed of decisional significance".

The Commission also made it clear that any comments filed with the Commission were to be served upon opposing counsel, even to the extent of specifically including the name and address of counsel for Henderson and Bryan at paragraph 5 of the Request. In response to the FCC Request, Henderson filed his Comments on the appointed day, and served Bryan as required. Bryan filed comments on that same day but did not serve Henderson, as required by the general FCC rules as well as the explicit requirement set forth in paragraph 5 of the Commission's Request for Comments. The essential part of Bryan's Comments was its indication there that it had now 'decided' it was time to move from its existing non-compliant site, which was the very basis of the Court's remand, to a new site that fully complied with the FCC coverage rules, thereby effectively 'mooting' the question raised on appeal and remanded by the Court i.e. Bryan's substantial noncompliance with rule 73.315(a).

Henderson strenuously objected to Bryan's blatant attempt to "improve" the facts of its case by now proposing to change from its non-compliant site, as specified in July of 1997, held as a

construction permit at the time of the Commission's first defective Decision in July of 1998, held through the Notice of Appeal in this case, and held at the time of remand, being filed by Bryan just over one month after that remand. But that was not all. The new site requested by Bryan on April 19, 1999, was itself defective and subsequently rejected by the FAA on June 8, 1999. But Bryan was not done. On September 1, 1999, as decision of this case continued to languish at the Commission, Bryan filed for yet another site, this filing being almost four months after the comment period had expired in this case, four months after the Commission's own self-imposed cut-off after which "no information submitted by a party will be deemed of decisional significance." Over two months after that filing, on November 11, 1999, Bryan filed yet another pleading, this time reporting the FAA clearance of the tower site it had filed on September 1, 1999.

Had the FCC followed its own rules, none of these new tower changes proposed by Bryan would have been recognized since by the Commission's own words, none of those filings would be deemed to have any "decisional significance" in this remanded proceeding. But the FCC did not follow its own rules and in Status Reports filed by the Commission with the Court on September 7, 1999, as well as December 7, 1999, the Commission indicated it was being delayed in its new Decision in the case due to the filing of "supplemental pleadings [which] the staff is presently analyzing". Had the Commission been observing its own rules, recognizing that none of these "supplemental pleadings" had any

"decisional significance" there would have been no need for the staff to waste its time "analyzing" such meaningless filings. Of course, what the Commission told the Court was true, that contrary to its own prior statements to the contrary and Henderson's reliance upon those statements, it was considering all of the post-comment pleadings filed by Bryan and they would be accorded weight and obvious "decisional significance" in the Commission's ultimate Decision as finally released on February 15, 2000.

II. Reconsideration Requested of The New Decision Released February 15, 2000

While Henderson obviously disagrees with the conclusion of this Decision as well as the reasoning of that conclusion, there are two main areas which we wish to raise here on reconsideration consisting of record evidence not considered, additional facts relating to new authorizations by the FAA consistent with Henderson's proposal and his claim of a valid basis to expect FAA approval at his existing site, and new facts relating to a change in the FM Table, specifically a downgrade of an existing allocation in Victoria, Texas requested by the licensee and granted by the Commission which has opened up a new area for Henderson's tower in compliance with all FCC coverage rules, and Henderson's application to move to that new fully compliant site.

More specifically, the areas raised for reconsideration consist first, as to the Commission's professed difficulty in recognizing the existing broadcast tower located on Henderson's existing site and the fact that a new tower at that site would

not be objectionable to the FAA; and secondly, the fact that Henderson on February 24, 2000 filed an application to modify his site to a new location that fully meets all FCC rules including the city coverage rule of 73.315(a).

A. Recognition of The Existing Tower, A Second Tall Tower Also Approved by FAA, and the Reasonable Basis For the FAA Approval of Henderson's Tower at his Existing Site.

In the original Decision, The Commission claimed that Henderson would have no right to expect FAA approval of his 150 meter tower since the other existing tower on that site was only 59 meters high. The information relied upon by the Commission in that Decision was totally wrong and we do not know where it came from since it has never been referenced by anyone in this case. In its original appeal brief filed with the Court of Appeals, Henderson included an Exhibit from the Commission's own data base showing that the existing tower was in fact 152 meters tall, taller than Henderson's proposed tower and again submitting that the FAA would have no objection to construction of Henderson's new tower on that same site. In the new Decision, the Commission does not discuss the "59 meter tower" anymore but now apparently claims that it just can't recognize the existence of that 152 meter tower since it was only "registered" (in a new FCC Tower Registration project adopted in May of 1996) in April of 1998. It also states that "Henderson has submitted no aeronautical study or other information indicating that the FAA would approve such a tower 1.2 miles from an existing tower." (Emphasis Supplied). That is just wrong.

First of all, the existing tower referred to by Henderson throughout this case, is the very same tower recognized and referred to by the Commission itself in its first Decision rendered on July 5 1995 (10 FCC Rcd 7285 (1995)) where in paragraph 5 it recognized the tower owner as "Chet Fry", a confidant of Bryan's who would not allow Henderson to locate on his existing tower 2/ as an obvious way to try to force the Decision in Bryan's favor. See also paragraph 7 of the Decision on Reconsideration released May 9, 1996 (11 FCC Rcd 5326(1996)) also recognizing Fry as the owner of the existing tower at that site.

Beyond that, as to the existence of the tower itself, it was first approved by the FAA and the FCC in 1983, has been occupied by multiple FCC licensees since that time, all of whom had to specify the tower in their individual applications to the FCC, all of whom had to file renewal applications on a regular basis and all of whom still occupy and broadcast from that existing tower. Official Notice is requested of the Commission's own records establishing the longtime and well-known existence of that tower. See also the Engineering Exhibit attached hereto as Attachment B.

2/ This is the same place where the Commission also attributed ownership of the whole site to Mr. Fry, ignoring the fact that Fry was only a lessee himself and that the true property owner had agreed in writing to allow Henderson use of the same site, all submitted by Henderson in a pleading filed well before that Decision, but totally ignored, just as the Supplemental pleading was ignored in the Commission's July 1998 Decision.

As to the Commission's suggestion that Henderson's tower located at the same site within 1.2 miles of the existing tower, would have any difficulty with the FAA in gaining FAA approval, it is just wrong. On July 10, 1996, Henderson filed a "Reply to Opposition to Application for Review" which included a formal Declaration by Henderson's Consulting Engineer, not only a broadcast engineer, but also a licensed pilot, very familiar from both perspectives with FAA rules and policies. The Declaration indicates that the Engineer contacted the FAA, asked them if there would be any difficulty locating a new tower on the same site as an existing 152 meter tower and was told by them, there would be no problem in gaining FAA approval of the new tower under those circumstances, so long as the new tower would not be higher than the existing tower (which it would not be). The statements attesting to the acceptability of the tower at that site was submitted by an expert in the field under penalty of perjury and should be recognized as such. See Attachment A.

Subsequent to that statement it was found that there was a minor discrepancy between Mr. Fry's tower site coordinates as on file with the FAA and the FCC to the extent of an additional 785 feet. This was recognized by Henderson's consulting Engineer in an Engineering Statement filed on July 8, 1997 in a "Reply to Opposition to Motion For Leave to File Supplement to Application For Review" where the Consulting Engineer reaffirmed his prior statement that the FAA would have no objection to the new tower on the same site as the existing tower and that an additional 785 feet one way or the other would make no difference in that

determination. For the Commission's convenience, a copy of the original Declaration as well as the subsequent Engineering Statement is attached hereto as Attachment A. Finally, as conclusive proof that Henderson's engineer was correct in his Declaration, we note that it has now also been found 3/ that in 1996 an additional new tall (204 meter) tower was also approved by the FAA (FAA Study No. 96-ASW-0776-OE) approximately 6 miles southeast of Henderson's proposed tower, leaving Henderson's proposed tower now lying between the 152 meter Fry tower and the 204 meter new tower, leaving no doubt whatsoever that the Henderson tower would be fully acceptable to the FAA.

On the basis thereof, we request that the Commission reconsider its position and recognize the existence of the tower built and licensed to Chet Fry in 1983 on Henderson's site, as well as the new tower recently built and approved by the FAA and this clear evidence that construction of a new tower at that same site would not be objectionable in any way to the FAA, and could be reasonably relied upon as such by both Henderson and the Commission in this proceeding.

B. Specification of A New Site by Henderson Fully Consistent With Rule 73.315(a).

At page 24 of Henderson's "Comments In Response to Judicial Remand" as filed with the Commission on April 29, 1999, Henderson included a Section entitled "A New Fact Relevant to The 73.315(a)

3/ The existence of this new additional tall tower authorization in the area was not readily apparent and was just discovered by Henderson's Consulting Engineer in preparing the Engineering Statement submitted with this Petition.

Analyses" which brought to the Commission's attention the fact that an existing station licensed to Victoria, Texas (KAMG(FM), formerly KVIC(FM), facility # 28477) had filed for an "instant down-grade" from 236C1 to 236C3, the effect of which would be to open an additional wide-area of site availability for Caldwell, all in full compliance with the city grade coverage requirements of 73.315(a) as well as all other FCC rules. At that time Henderson indicated that upon such a change and reduction of power for KAMG(FM), that Henderson would file for a site change that would provide the more favorable and fully compliant service to Caldwell.

On August 13, 1999, the Commission granted the request of KAMG(FM) (BPH-990121IE) and issued the construction permit authorizing the reduction in power. It is Henderson's understanding that the power reduction for this station took place on February 17, 2000, and that the license application for the reduced classification was filed shortly thereafter and KAMG(FM) is now operating as a Class C3 facility on Channel 236. Accordingly, on February 24, 2000, Henderson filed an application for change of site to operate on channel 236C2 from the new fully compliant site for Caldwell. A copy of the application as filed is attached hereto. Consistent with the Commission's recognition of site changes as filed by Bryant and referenced by the Commission in its Decision released February 15, 2000, Henderson requests that upon reconsideration, the Commission also consider Henderson's operation from his new fully compliant site.

III. Conclusion

In sum, Henderson submits that on Reconsideration the Commission should recognize the existing tower on Henderson's site, FAA approval of another 204 meter tower in the same vicinity as Henderson's, six miles south, the fact that Henderson has written assurance to build a new tower on his site and that he also has more than reasonable grounds to expect FAA approval of a new tower on that site. As such, and holding the Bryan proposal to what it was at the time of the Commission's prior Decision of July 22, 1998, 4/ Henderson with his superior coverage and de minimis violation of the requirements of 73.315(a) should be preferred to Bryan with its inferior coverage and substantial violation of 73.315(a).

If, on the other hand, the Commission is considering site change applications such as those filed by Bryan as late as September and November of 1999, as it indicated in its February 15, 2000 Decision (See especially paragraphs 6, 15, and 17), then it must also consider the site change by Henderson as first referenced and committed to in the Comments In Response to Judicial Remand as filed with the Commission on April 29, 1999. On that analyses, Henderson should also prevail with superior coverage and full compliance with the rules as compared to inferior coverage and (presumed) full compliance with the rules

---

4/ It is noted that notwithstanding its many applications and specification of four different sites, as of this writing, Bryan's construction permit stands as the deficient site it requested in July of 1997 and was granted in March of 1998.

by Bryan. In either case, the public interest would be best served by the Henderson proposal.

Wherefore, we respectfully request that the Commission reconsider its Memorandum Opinion and Order (FCC 00-50) released February 15, 2000, and in view of the matters set forth herein, reverse that Decision, grant the proposal of Roy E. Henderson and deny the proposal of Bryan Broadcasting License Subsidiary, Inc.

Respectfully Submitted,

ROY E. HENDERSON

by _____
Robert J. Buenzle
His Attorney

Law Offices
Robert J. Buenzle
12110 Sunset Hills Road
Suite 450
Reston, Virginia 22090
(703) 715-3006

March 15, 2000

Petition for Reconsideration of
FCC Decision FCC 00-58, 2-15-2000
MM Docket no. 91-58
Caldwell, Texas et al
March 15, 2000

ATTACHMENT A

1. Declaration of Fred W. Hannel dated July 9, 1996, submitted to FCC with "Reply to Opposition To Application For Review" filed July 10, 1996.

2. Affidavit of Fred W. Hannel dated July 8, 1997, submitted to FCC with "Reply To Opposition To Motion For Leave To File Supplement To Application For Review" filed July 8, 1997.

~~Attachment A~~

DECLARATION

I, F. W. Hannel, under penalty of perjury, make the following statements with regard to the reference tower site used for the requested assignment of FM Channel 236C2 to Caldwell, Texas.

1. I have contacted the Federal Aviation Administration in Fort Worth, Texas, regarding the tower proposed by the applicant for FM Channel 236C2 at Caldwell, Texas.

2. The tower site co-ordinates for the allotment site for FM Channel 236C2 at Caldwell, Texas, are N30-45-24, W96-28-00.

3. The Federal Aviation Administration has approved a tower that is constructed on the same property as is specified as the reference transmitter site for the proposed allotment of FM Channel 236C2.

4. The co-ordinates for the already constructed tower that is owned and operated by Chet Fry, are N30-45-27, W96-28-04. This existing tower is approximately 200 feet from the allotment reference site specified for FM Channel 236C2 at Caldwell, Texas.

5. The already constructed tower is 152 meters, (499 ft.), above Mean Sea Level, and the tower required for use as a transmitter site for the proposed allotment site is the same or less than the height of the already constructed tower.

6. The Federal Aviation Administration has advised the undersigned that it sees no reason why another tower constructed within 200 ft. of the existing tower would present any aviation concerns, provided the new tower did not exceed the height of the existing structure, which it does not.

The above statements of fact are true and correct to the best of my knowledge and belief.

Signed and dated this 9th Day of July, 1996.

Respectfully,

F W Hannel

F. W. Hannel, PE

STATE OF ILLINOIS)
) SS:
COUNTY OF PEORIA)

F. W. Hannel, after being duly sworn upon oath, deposes and states:

He is a registered Professional Engineer, by examination, in the State of Illinois;

He is a graduate Electrical Engineer, holding Bachelor of Science and Master of Science degrees, both in Electrical Engineering;

His qualifications are a matter of public record and have been accepted in prior filings and appearances requiring scrutiny of his professional qualifications;

The attached Engineering Report was prepared by him personally or under his supervision and direction and;

The facts stated herein are true, correct, and complete to the best of his knowledge and belief.

F W Hannel

July 8, 1997

F. W. Hannel, P.E.

F. W. Hannel, PE
911 Edward Street
Henry, Illinois 61537
(309) 364-3903
Fax (309) 364-3775

Roy E. Henderson
Post Office Box 590209
Houston, Texas 77259

Engineering Statement
Caldwell, Texas
MM Docket 91-58
July 1997

This firm has been retained by Roy E. Henderson, permittee of Radio Station KHEN(FM), Caldwell, Texas, to prepare this engineering statement in the above captioned proceeding in response to a filing of Bryan Broadcasting License Subsidiary, Inc., licensee of Radio Station KTSR(FM), College Station, Texas.

Initially it should be noted that the engineering statement dated June 23, 1997, contains a number of items that are simply rehashes of old filings. Namely, the filing contained a lengthy dialogue regarding Henderson's compliance with Woodstock, which has been addressed in prior filings. Essence, it is claimed that somehow the FAA would not allow the construction of a tower near an existing 500 ft. tower for locating an antenna for FM Channel 236C2 near Caldwell, Texas, and that somehow Henderson must seek FAA clearance for that construction, even though the proposed construction is located on the same property where an existing 500 ft. tower is located. Woodstock essentially requires that the applicant demonstrate that a tower site is available, and FAA clearance is one item to be considered. Certainly the existence of another tower on the same property would indicate that the FAA would have no objection to the construction of another similar tower, as was confirmed in informal discussions. Parenthetically, at the time of filing for a Construction Permit, the applicant could seek a tower site that complies with the provisions of Section 73.215 of the Commission's rules. That section of the Commission's rules was adopted well after Woodstock, and clearly applies to the Caldwell situation. To claim that the failure of the applicant to seek FAA clearance for an additional tower in this situation renders the upgrade at Caldwell ungrantable is the epitome of form over substance. Clearly the applicant

would be able to construct such a tower if required, and FAA clearance simply is not a problem in this case.

In addition to the foregoing, Bryan Broadcasting proceeds, ad nasuem, to calculate the location of the existing tower from the Commission's SSB database, which appears to be different from the FAA database. While this applicant has no way to determine when the tower was moved, or by whom, it is clear that two sets of co-ordinates that differ by a mere 785 ft. can hardly be classified as a material difference. Perhaps when SSB and FAA database records are reconciled through the filing of FCC Form 854, the mystery will be solved. In any event, the differences are simply minor, and to imply the minor difference somehow moves FAA clearance into an area of uncertainty is simply absurd. As a licensed 15,000 hour multi engine and instrument rated pilot and as a registered professional engineer who had dealt with FAA matters for 28 years, this affiant finds such conclusions not only offensive but patently ridiculous. Factually, the FAA will have no problem with issuing a no hazard determination to the applicant for construction of a tower to support the antenna for the proposed facility.

It should be specifically noted that Bryan focuses on the methodology employed in the calculation of the terrain roughness factor, yet, by its own admission, some correction is appropriate. Insofar as this applicant only needs to show coverage of a deserted motel and a portion of a runway, it is obvious that almost *any* correction will be sufficient to extend the city grade contour to enclose the city of Caldwell, since only 4% of the city may fall outside the city grade contour. With this observation and the fact that even Bryan admits that some correction is appropriate, one is left only to argue with the magnitude of the correction. This applicant will settle for a minor correction sufficient to extend its city grade coverage to include the abandoned motel and airport runway, and avoid any argument as to the methodology employed.

Finally, it is clear that this applicant has shown that the city of Caldwell is provided city grade coverage using the provisions of Tech Note 101 and by using terrain roughness in the calculation of city grade coverage. The only calculation that

shows the proposed facility falling substantially short of city grade coverage is one utilizing the least accurate method, namely, the Commission's f(50,50) curves. Substantial coverage of the city of Caldwell seems to be not so much a matter of science as a matter of policy, and it appears that this case must be resolved accordingly.

As a final matter we note that the proposed replacement channel 297A for Caldwell, as proposed by the Commission, fails to meet the minimum mileage separation requirements of Section 73.207 of the Commission's Rules. As the Commission stated in adopting the provisions of Section 73.215 of its Rules (See *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced Antennas Using Directional Antennas, 69 RR 2d 1106*):

> "13. With respect to the impact of contour protection on our general allotment rules, we have held throughout this proceeding that no change has been made or will be made in the FM channel allotment process. All proposals for channel allotments must meet the minimum distance separations of Section 73.207 of our rules with respect to other existing and prospective stations."

As has been previously shown, the replacement FM Channel 297A at Caldwell fails to comply with Section 73.207 of the Commission's Rules, and, therefore, under a plain reading of the above paragraph, it cannot be assigned as a replacement channel at the existing site of Radio Station KHEN(FM) at Caldwell, Texas.

Petition for Reconsideration of
FCC Decision FCC 00-58, 2-15-2000
MM Docket no. 91-58
Caldwell, Texas et al
March 15, 2000

ATTACHMENT B

Engineering Statement

Roy E. Henderson
Post Office Box 590209
Houston, Texas 77259

Engineering Statement
Caldwell, Texas
MM Docket 91-58
March 2000